APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-2523

LISA LEE MINES (TERRILYNNE COAL COMPANY),
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; ALVA RUTTER,
Respondents.

On Petition for Review of an Order
of the Benefits Review Board,
(92-338-BLA)

Argued: January 30, 1996

Decided: June 19, 1996

Before: WILKINSON, *Chief Judge*, and RUSSELL, WIDENER, HALL, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, *Circuit Judges.*

Affirmed by published opinion, Judge Hall wrote the majority opinion, in which Judges Widener, Murnaghan, Ervin, Niemeyer, Michael, and Motz joined. Judge Niemeyer wrote a concurring opinion. Judge Luttig wrote a dissenting opinion, in which Chief Judge Wilkinson and Judges Russell, Wilkins, Hamilton, and Williams joined.*

OPINION

HALL, Circuit Judge:

Lisa Lee Mines petitioned for review of an order of the Department of Labor's Benefits Review Board (BRB) affirming the award of black lung benefits to Alva Rutter, a former coal miner. A panel of this court reversed and remanded. *Lisa Lee Mines v. Director, Office of Workers' Compensation Programs*, 57 F.3d 402 (4th Cir. 1995). Rutter, who had proceeded pro se before the panel, obtained counsel and sought rehearing en banc. Having granted such rehearing, we now affirm.

I.

Putting aside for a moment the question on which the parties disagree, we must first note that Alva Rutter's medical condition unquestionably qualifies him for black lung benefits. He is the very paradigm of the man Congress intended to compensate. According to x-rays taken in 1988 and 1989, he has profuse [1] small opacities in all six lung zones, upon which has developed complicated pneumonoconiosis, or, by its more dauntingly descriptive name,

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* Amended by Order dated July 16, 1996.

[1] One reader classified the profusion as 2/3 and the other as 3/2. There are twelve levels of profusion classification for the radiographic interpretation of simple pneumoconiosis. 2/3 is the fourth highest profusion and 3/2 the third. See N. LeRoy Lapp, "A Lawyer's Medical Guide to Black Lung Litigation," 83 *W. Va. Law Rev.* 721, 729-731 (1981).

"progressive massive fibrosis." One of the 1989 readers classified the large opacities in Rutter's lungs in Category B, which means that they are greater than *two inches* in diameter. Because progressive massive fibrosis is just that —progressive—Rutter is doubtless worse off now, seven years later, and he is not yet an old man.[2] He spent his entire working life—32 years—in the mines, most of it loading coal by hand. Because of this long tenure, he need prove nothing more than his complicated pneumoconiosis to be entitled to benefits. 30 U.S.C. § 921(c)(1), (3); 20 C.F.R. §§ 718.302, .304. In short, the substance of Rutter's claim is fine.

II.

Procedure is the rub. In 1986, without the assistance of an attorney, Rutter applied for black lung benefits. He was still working at the time. An x-ray he submitted showed complicated pneumoconiosis; nonetheless, a Department of Labor claims examiner sent him a form denial. Rutter did not pursue the claim further.

In April 1989, he filed a new claim.[3] Because of the denial of his earlier claim, this one was subject to the "duplicate claims" regulation at 20 C.F.R. § 725.309(d), which states, in relevant part:

> If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions . . . .

This time a deputy commissioner[4] in the Department awarded benefits. The responsible operator, petitioner

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[2] Rutter was born June 5, 1936. At the time of his 1989 claim application, he had five minor dependent children living at home.

[3] Rutter was still working as a miner helper at the time, though, the very next month, his breathing problems led to a transfer to less arduous toil. He retired in January 1990.

[4] "Deputy commissioners" are now referred to as "district directors." 20 C.F.R. § 725.101(a)(11) (1995).

Lisa Lee Mines, requested a hearing. Lisa Lee's challenge to the deputy commissioner's decision was limited to whether Rutter had made the threshold showing of a "material change in conditions." The parties then agreed to submit the question on the existing record.

On October 11, 1991, an administrative law judge (ALJ) issued a decision and order awarding benefits. After canvassing the evidence, the ALJ concluded, "the medical evidence in 1989 shows a definite progression of the disease occurring over another interval of time resulting in the Claimant's reduced capacity to do his former coal mine work."

The ALJ then went on to hold that, if the evidence were inadequate to establish a material change in condition, Rutter would still be entitled to benefits. According to the ALJ, the 1986 denial was erroneous on its face and "null and void *ab initio*." Consequently, "it is believed that a determination whether or not the new evidence establishes a change of condition is immaterial." The ALJ set the date of onset of disability as August 1, 1986.

On September 30, 1994, the BRB modified the award. It held that the ALJ's finding of an actual progression of Rutter's disease was sufficient to satisfy its *Spese*[6] test for material change in condition. However, the BRB held that the ALJ had no power to reopen or review the denial of the 1986 claim, which became final upon Rutter's failure to appeal or move to modify it. The BRB therefore affirmed the award but changed the date from which benefits were payable to April 1, 1989, Lisa Lee then filed a timely petition for review in this court.

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[6] *Spese v. Peabody Coal Co.*, 11 BLR 1-174, 1-176 (Ben. Rev. Bd. 1988) (change in conditions is established by evidence that is "relevant and probative so that there is a reasonable possibility that [it] would change the prior administrative result.").

III.

Lisa Lee's argument is as easily stated as it is counter-intuitive: Rutter must now lose because he clearly should have won in 1986. He likely should have; the ALJ here was so appalled by the 1986 denial that he deemed it "void *ab initio*." Nonetheless, though we might share the ALJ's sentiment, we agree that his reasoning was flawed. The 1986 denial is final, *see Pittston Coal Group v. Sebben*, 488 U.S. 105, 122-123 (1988), and for present purposes, we must assume that it was correct.

The panel rejected the BRB and Director's standards for determining whether there was a material change in Rutter's condition. The panel criticized the BRB's *Spese* standard because it "impermissibly allows a claimant to present . . . evidence available at the time of the initial decision tending to show that the initial decision was in error." 57 F.3d at 406. The Director's standard met similar criticism: "it permits reconsideration of critical determinations underlying a decision denyng benefits." *Id.* at 407. Instead, the panel adopted the Seventh Circuit's test, which, as applied, meant that the miner must show that his condition has changed on every element previously decided against him. *See Sahara Coal Co. v. Director, OWCP*, 946 F.2d 554 (7th Cir. 1991). Moreover, as in *Sahara Coal*, the panel required inquiry into the evidence behind the earlier decision, rather than merely accepting the factual predicate of the earlier decision as correct. Consequently, the panel remanded for an all-but-certain finding that Rutter had actually been eligible for benefits in 1986, so his current conceded eligibility could not evince a material change in condition. We disagree with this reasoning.

If the 1986 denial is "final" in a legal sense, we must accept the correctness of its legal conclusion—Rutter was not eligible for benefits at that time—and that determination is as off-limits to criticism by the respondent as by the

claimant. Only by repudiating the 1986 judgment and its necessary factual underpinning can no change in Rutter's condition be found. We believe that such repudiation is improper.

Accepting the correctness of a final judgment is more than legalistic tunnel vision; it is a practical—perhaps the only practical—way to discern a concrete form in the mists of the past. The ease we might feel at second-guessing *this* final judgment ought not tempt us to overestimate our restrospective perspicacity; most black lung claims involve a mixed bag of test results and wildly divergent medical opinions. The final decision of the ALJ (or BRB or claims examiner) on the spot is the best evidence of the truth at the time.

In this regard, the panel opinion could be read to imply that the deputy commissioner made an express finding of fact in 1986 that Rutter had complicated pneumoconiosis. *See* 57 F.3d at 404 ("A Department of Labor deputy commissioner denied that claim, *finding that although Rutter had presented evidence of complicated pneumoconiosis,* he had not established that the disease was caused by coal mine work, or that he was totally disabled by the disease.") (emphasis added). This implication is mistaken. The form denial neither states that Rutter has complicated pneumoconiosis nor acknowledges that he "had presented evidence" of it. It may have been obvious to all who could and would see, but a finding that should have been made is not a finding that *was* made.[6]

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[6] We can only speculate that Rutter would have had the 1986 denial reversed on appeal to an ALJ, the BRB, or this court. For all we can know, had Rutter requested a hearing, the respondent would have produced a dozen radiologists to deny that his x-rays were positive for complicated pneumoconiosis.

Moreover, it is at least conceivable that the claims examiner consciously rejected the x-ray evidence of complicated pneumoconiosis as inconsistent with Rutter's "essentially normal" pulmonary function tests.

Not only does the denial of benefits itself necessarily imply the opposite finding, *see* 20 C.F.R. §§ 718.302 and .304, but the language of the summary denial form can logically lead only to that finding. In one part of the correspondence, Rutter was told that he had not proved total disability; in another, he was invited to submit additional evidence on that issue, and was told that proof of complicated pneumoconiosis would suffice.[7]

We accept the final 1986 decision, as well as its necessary factual predicate, as correct. Rutter has shown a stark change in condition, and he is entitled to have his 1989 claim decided on its own considerable merits.

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[7] The denial of benefits was accomplished through Department of Labor form letter No. CM-1000a (Jan. 1982) and its "Guide for Submitting Additional Evidence," No. CV-1000g (Jan. 1982). The letter states, as pertinent here:

> Dear Claimant:
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> We have carefully reviewed the evidence in your claim under the Black Lung Benefits Act. This evidence does not show that you qualify for black lung benefits.
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> * * * *
>
> You do not qualify for benefits because the evidence in your claim
>
> * * * *
>
> 2. (X) does not show that the disease was caused at least in part by coal mine work; [and]
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> 3. (X) does not show you are totally disabled by the disease. Totally disabled means you are unable to perform the type of work required by your coal mine work because of a breathing impairment caused by pneumoconiosis (black lung disease). The results of your medical evidence are shown on the enclosed explanation.

The guide for submitting additional evidence directed Rutter to submit proof of total disability due to pneumoconiosis. Five types of such proof were listed; the very first was "X-ray or other evidence confirming the presence of complicated pneumoconiosis (the most severe form of black lung disease) [.]"

IV.

A.

Rutter's is just a single case, and our reasons for affirming the award could end here. However, the proper standard to determine whether a given claimant has proved a "material change in condition" has recently split the circuits, and we now take this opportunity to align ourselves with the Third and Sixth Circuits, rather than the Seventh.

In choosing the proper standard, we have three candidates: (1) the BRB's *Spese* formulation, which broadly looks to whether the newly submitted evidence favorable to the claim has a "reasonable possibility" of changing the prior result; (2) the *Sahara Coal* test, adopted by the Seventh Circuit and the panel here, which requires the miner to show that he "did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application," 946 F.2d at 556; and (3) the Director's "one-element" standard, which requires the claimant to *prove*, under all of the probative medical evidence of his condition *after* the prior denial, at least one of the elements previously adjudicated against him. The Director's standard, to which we owe deference,[8] is easily the most reasonable and workable of the lot. To explain why, we should begin with background principles.

B.

A new black lung claim is not barred, as a matter of ordinary *res judicata*, by an earlier denial, because the claims are not the same. The health of a human being is not susceptible to once-in-a-lifetime adjudication.

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[8] *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *see generally, Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984).

> It is almost too obvious for comment that res judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times, particularly in the case of occupational diseases.

3 A. Larson, *The Law of Workmen's Compensation*, § 79.72(f) (1989). The issue in 1986 was Rutter's condition in 1986, and his future condition was not and could not have been litigated then.

Thus, nothing bars or should bar claimants from filing claims *seriatim*, and the regulations recognize that many will. *See, e.g.*, 20 C.F.R. § 725.409(b) (if prior claim has been denied by reason of abandonment, "a new claim may be filed at any time and new evidence submitted where [the claims modification process is unavailable.]") The duplicate claims regulation, 20 C.F.R. § 725.309(d), does not *bar* new claims, but rather directs that they shall be *denied* based on the earlier denial absent a threshold showing of a material change in conditions. Thus, the regulation simply interposes a rebuttable presumption that nothing has changed, apparently to lessen the administrative burden of the black lung program.[9] It creates a sort of presumptive finality operating upon a future dispute, a finality that must not be confused with ordinary *res judicata*, which cannot look forward.

The *Sahara Coal* test, as applied by the panel here, forces the claimant to show a material change on *every* element that was previously decided against him.[10] This

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[9] Lisa Lee correctly notes that there is no express statutory basis for the duplicate claims regulation, and asserts that it is invalid. The premise of this argument is that, absent the regulation, miners could not file new claims. But of course they could; as the excerpt from Larson's treatise quoted above makes clear, common-law *res judicata* has no applicability where the issue is a person's health at two different times.

[10] If, as we have held above, the necessary factual premises of the 1986 decision must be accepted as true, Rutter would win under any standard. Because of statutory presumptions, *see supra* at 3, proof of complicated pneumoconiosis, in and of itself, establishes "all elements" of Rutter's claim.

approach fails to account for the frality of alternative holdings. A black lung claimant must prove every element of his claim. If he loses on one, or two, or three elements, the end result is the same: a denial. For this reason, if he loses on more than one element, but only one is in fact a correct basis for denial, the law does not impose a duty upon him to file a meaningless appeal to "correct" the erroneous alternative holdings. Otherwise, "the rule might be responsible for increasing the burdens of litigation on the parties and the courts rather than lightening them." Restatement (Second) of Judgments § 27, comment *i.* (1982). Accordingly, holdings in the alternative, "either of which independently would be sufficient to support the result, . . . [are] not conclusive with respect to either issue standing alone." *Id.*

Here we meet up with something of a dilemma. We must have an anchor in the past with which to compare current conditions, but alternative holdings are not necessarily conclusive.

The Director's approach strikes a reasonable balance. Each of the alternative holdings is permitted to have been correct when made and to continue to be correct through time. Because of their tenuous nature, however, disproof of the continuing validity of just one of the alternative holdings is enough to establish a material change in condition. We defer to the Director's reasonable interpretation of the duplicate claims regulation. In doing so, we join the Third and Sixth Circuits. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994).[11]

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[11] We do not endorse, however, the closing paragraph of *Sharondale Corp.*, 42 F.3d at 999, where, after adopting the Director's standard, the Sixth Circuit seems to have required consideration of the evidence behind the earlier denial to determine whether it "differ[s] qualitatively" from the new evidence. Even if we agreed with such a requirement, Rutter certainly satisfied it here, inasmuch as the ALJ found an actual deterioration in his condition.

C.

In comparison to the Director's approach, *Spese and Sahara Coal* come up short. The *Spese* test is too vague to be applied consistently, contains illogical evidentiary rules (it permits resort to evidence available before the prior denial and forbids consideration of contrary probative evidence), and arguably sets too low a threshold ("reasonable possibility") to discern "material" changes in condition.

Sahara Coal has two flaws. First, it founders on issue-preclusion principles where there are alternative holdings in the first claim, as discussed above. Second, and more importantly, it is the only one of the standards that permits—in fact demands—a plenary review of the evidence behind the first claim. For example, it is not enough for the miner to rely on an ALJ's final determination that he did not have pneumoconiosis or was not disabled by it. The miner must affirmatively prove that these adverse determinations were correct.[12] To use that court's own words, its standard "makes mincement of res judicata." 946 F.2d at 556.

V.

We are not unmindful of the possibility that the Director's standard might encourage abuse of the administrative process by wily claimants and their wily lawyers. After today's decision, an unsuccesful claimant will doubtless schedule a morning appointment with a compliant physician for a year and a day after the denial of his claim.

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[12] The Seventh Circuit did speculate that this rule might allow for an exception if the claimant's current condition were "substantially worse," lest the possibility of his prior entitlement "complicate the proceeding unduly." 946 F.2d at 558. Where the claimant is only "slightly worse off," however, he must prove that he correctly (and slightly) missed the disability threshold the first time around. *Id.* This requirement lends itself to evidentiary mischief, inasmuch as the prior file will generally contain "admissions" by the miner of all of the elements of entitlement.

Armed with evidence contrary to an element previously found against him, the claimant will file a new claim that afternoon, and so on, ad infinitum.

This scenario belongs to that genre of horribles that seems impressive in academic debate but has little relevance to real life. Any claimant who wants to be a perpetual litigator can already be a perpetual litigator, and in a much easier fashion. The day before his hypothetical doctor's appointment, the miner may file a reques for "modification" of the earlier denial. For the claimant, modification is a far more attractive option than a new claim, because, in addition to a change in conditions, it can be based on a "mistake in a determination of fact" in the original denial. 20 C.F.R. § 725.310(a). No new evidence is required. A claims examiner may " 'correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.' " *Jessee v. Director, OWCP*, 5 F.3d 723, 724 (4th Cir. 1993) (quoting *O'Keeffe v. Aerojet-General Shipyards, Inc.* 404 U.S. 254, 256 (1971) (per curiam) (decided under Longshore and Harbor Workers' Compensation Act)). Because the § 725.310(a) procedure *modifies* the original denial, the claimant has the opportunity to collect benefits from an onset of disability date preceding the original denial. The miner who waits a year and a day must file a brand new claim, and, as we have stated above, the prior denial becomes a final adjudication that the miner was not disabled by pneumoconiosis as of the date of its issuance.

Moreover, a miner who wanted to file duplicate claims ad infinitum would have to live ad infinitum. The black lung claims process is extraordinarily slow; today, in 1996, we still routinely hear cases involving the 20 C.F.R. § 727.203 interim presumption, which was superseded by the permanent regulations *sixteen* years ago. *See* 20 C.F.R. § 718.2 (permanent regulations effective March 31, 1980). Few miners have the time or wherewithal to

go through the system twice; all too many die during the first run.[13]

The risk of sporadic abuse of the duplicate claims process is far outweighed by the necessity that there be some such process and by the utility of the Director's approach to it. As we emphasized above, pneumoconiosis—especially in the advanced form from which this claimant suffers—is a progressive disease, and no rational system of law or of medicine could stand on the proposition that it can or must be measured only once.[14] A rational system would simultaneously account for the progressiveness of the disease, discourage useless appeals of alternative holdings, and require, at the threshold, a palpable basis to believe that conditions have changed over time. The Director's "one-element" approach accomplishes this difficult task.

VI.

Finally, we return to Mr. Alva Rutter. In clinical terms, the change in his condition has been very real, even if we reexamine the 1986 evidence. The ALJ found that, in 1986, Rutter had small opacities of 2/2 profusion in four of six lung zones, with large opacities of category A

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[13] Of course, an especially cagey claimant could abuse the system by simply dropping each claim after its administrative denial, filing anew in a year and a day, and waiting, as if for the lottery jackpot, to strike it rich with a sympathetic claims examiner.

The elaborate ploy could happen; all sorts of odd things happen. But it simply does not describe typical human behavior. Our lottery winner, for all the skill of his gambit, would quickly find himself faced with a controversion of the claim from the responsible operator, and he would then get a much belated chance at his decade of litigation. Out-of-work coal miners, disabled or not, generally need money badly enough to forgo such pointless intrigue in favor of honestly and earnestly prosecuting their claims.

[14] Accepting this proposition would put the miner in an absurd dilemma. Should he file now, and risk losing everything by filing a bit "too soon," or should he wait a few years until his disease has progressed to a more "favorable" stage?

(greater than one but less than five centimeters in diameter). By 1989, small opacities clogged all six lung zones, in greater profusion (2/3 to 3/2), and large opacities had progressed to Category B (greater than five centimeters). In 1986, notwithstanding his advanced disease, Rutter could work and support his family. Now he cannot. From Rutter's viewpoint, the change in his condition could scarcely be more "material."

The award of benefits is affirmed.

AFFIRMED

NIEMEYER, Circuit Judge, concurring:

I join in Judge Hall's opinion for the court but write separately to explain that my vote does not rest on the assumptions that the dissent attributes to the majority opinion.

The effect of the majority opinion is to award benefits to a person who indisputably falls within the class of persons that Congress intended to benefit. While a review of the record from the claimant's first application for benefits may call the original denial of benefits into question, established and desirable principles of finality bind us to accept that conclusion. On the claimant's reapplication for benefits some years later, the objective medical facts demonstrate that his condition worsened, to the point that the Department of Labor concluded, without difficulty, that the claimant was disabled. The change, defined by the later finding of disability when previously such a finding was not made combined with the finding of a worsened condition, is material. And it is that material change that demands my vote in favor of affirming the Department's award of benefits, but only from the date of the second benefits application.

I depart from the dissenting opinion where it draws the conclusion, contrary to the law of the case, that the claimant was "unquestionably disabled" at the time of his first application. To reach that conclusion, the dissent engages in an improper review of the first decision denying benefits. a decision the majority has left at rest.

Contrary to the dissent's suggestion, sympathy—other than for what the law prescribes—played no role in our disposition of this case.

LUTTIG, Circuit Judge, dissenting:

The majority today is tempted, and ultimately persuaded, by the sympathies of this case, as is evident from the fact that it begins its analysis by "[p]utting aside" the legal question before us, and instead, dwelling on the uncontroverted fact that the claimant today has complicated pneumoconiosis caused by coal mine work. Whether or not, in our judgment, Rutter has complicated pneumoconiosis, or whether he is someone to whom we would award benefits were it our responsibility, are not the questions before us, however. Rather, we have before us a question of law, whether this claimant has proven a "material change in conditions" that would warrant reconsideration of whether he is entitled to black lung benefits. *See* 20 C.F.R. § 725.309(d) (providing that a successive application for benefits "shall . . . be denied" unless there has been a "material change in conditions").

The Department of Labor promulgated section 725.309(d), the so-called duplicate claims provision, to allow miners who were *not* disabled at the time they were initially denied benefits an opportunity to establish their enttilement to benefits if they become totally disabled following a denial of benefits. As the Department itself described the regulation, "a miner whose claim has once been finally denied either by the Social Security Administration or the Department should be allowed to file a new claim on the grounds of a *progression to total disability*." *See* Discussion of Comments to Proposed Regulations on Duplicate Claims, 43 Fed. Reg. 36772, 36785 (Aug. 18, 1978) (emphasis added). The regulation was never intended to, nor does it, reach a person who was unquestionably disabled at the time of the initial denial, but erroneously held to be not disabled. The law provides avenues of relief—neither of which this claimant pursued—for a person who has been erroneously denied benefits. He may either appeal the erroneous decision, 20 C.F.R. § 725.410(c), or seek modification of that decision, for

up to a year after the initial denial, *id.* at § 725.310. He is not, however, entitled to benefits under the duplicate claim provision.

In order to conclude that this claimant is entitled to benefits under the duplicate claims provision, the majority entirely relieves claimants of their burden of proving a material change in conditions, holding that any miner who is currently entitled to benefits shall receive them, a standard that invites claimants to file claim after claim until they find a pliant ALJ. As the majority unabashedly explains:

> [N]othing bars or should bar claimants from filing claims *seriatim* . . . .
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> . . .
>
> After today's decision, an unsuccessful claimant will doubtless schedule a morning appointment with a compliant physician for a year and a day after the denial of his claim. Armed with evidence contrary to an element previously found against him, the claimant will file a new claim that afternoon, and so on, ad infinitum.

Ante at 8, 11. This is, of course, precisely the result intended to be avoided under the regulation. Like the now repudiated *Spese* standard, this standard fails even to examine or consider the claimant's original conditions, much less to require a determination of whether there has been a "material change" (or for that matter, even an immaterial change) in those conditions—as the Director himself concedes. *See* Director's Answer in Support of Respondent's Petition for Rehearing *En Banc* at 9 (acknowledging that the "one-element" test "allows an *inference of change*" in conditions to support reexamination of a duplicate claim (emphasis added)). Indeed, in its haste to award benefits in this case, the majority does not so much as bother to differentiate between a change and a "material change," effectively holding that all changes are material.

That the majority's standard allows recovery of benefits merely upon a showing that the claimant is today eligible for benefits, without any evidence whatever of a change in his condition, is confirmed by the fact that the majority expressly rejects the requirement, from the Sixth Circuit's decision it purports to adopt, that the ALJ make certain that the evidence presented with the duplicate claim '"differ[s] qualitatively'" from the evidence available at the time of the initial denial. *See ante* at 10 n.11 (quoting *Sharondale Corp.* v. *Ross*, 42 F.3d 993, 999 (6th Cir. 1994)). The majority, thus, adopts for this circuit the very rule that even the Sixth Circuit recognized was manifestly untenable under the regulation—that the claimant may recover benefits if "the ALJ merely disagree[s] with the previous characterization of the strength of the evidence." *Sharondale*, 42 F.3d at 999.

When all is said and done, therefore, the majority holds that a claimant is entitled to benefits if he comes forward with *any* additional evidence of his condition *"after"* the denial of the original claim and shows that he is now entitled to benefits, *ante* at 8, whether or not the claimant proves a material change (or a change at all) in his conditions from what they were at the time he was earlier denied benefits. A claimant, for example, who is denied benefits and then files a duplicate claim accompanied by an additional "probative" x-ray taken after the initial denial that is identical to the x-rays presented with the initial claim (that is, that show identical opacities) would receive black lung benefits on his duplicate claim, notwithstanding that his condition has not changed at all. For, he has, according to the majority, "*prove*[*d*], under all of the probative medical evidence of his condition *after* the prior denial, at least one of the elements previously adjudicated against him." *Ante* at 8. Not only is such a holding irreconcilable with the plain language of section 725.309(d), it "makes mincemeat" of the doctrine of *res judicata* underlying section 725.309(d) by permitting the previous decision to be reevaluated, as the majority itself says, *ad*

infinitum. *Cf*. *Sahara*, 946 F.2d at 556 (similar criticism of the *Spese* standard).

Because the standard articulated by the Seventh Circuit in *Sahara Coal Co.* v. *OWCP*, 946 F.2d 554, 556 (7th Cir. 1991), is the only standard which both requires a "material change in conditions" and respects the finality of the initial judgment, I would adopt that test as the law of this circuit. The *Sahara* standard provides that,

> [a] material change in conditions means either that the miner did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application.

Id. Of the various tests for determining eligibility for duplicate claim benefits, only the *Sahara* standard focuses upon the miner's *conditions* and requires that those conditions *change* in a way that is *material*. The majority's characterization notwithstanding, the *Sahara* standard does not require that the claimant show a material change "on every element previously decided against him," *ante* at 5, 9. Rather, it requires only that the claimant show, through a comparison of the evidence existing at the time of his original denial of benefits and the evidence currently available, that he was not then, but is now, eligible for benefits. In other words, the focus of the *Sahara* standard is not on the conclusions reached as to the conditions, but rather on the underlying conditions themselves, which is exactly what section 725.309(d)'s plain language demands. In no other possible way can it be determined whether the claimant's *conditions* have materially changed since the earlier denial of benefits.

The majority is critical of the *Sahara* standard because it believes that any examination of the evidence underlying the prior denial of benefits (that is, examination of the evidence as to the miner's prior condition) would offend

principles of *res judicata*. A standard that requires denial of a duplicate claim because the claimant's underlying conditions have not materially changed (for example, because the claimant was disabled then and is disabled now), however, does not undermine the original decision to deny benefits; rather, such a standard fully respects that decision, in stark contrast to the standard adopted by the majority, which continuously allows reopening of that original decision based upon evidence reflecting no change at all in the claimant's conditions. Instead of "foundering" on principles of *res judicata* and collateral estoppel, as the majority contends, the *Sahara* standard actually represents too strict an application of those principles for the majority, because that standard, unlike the majority's standard, *does* require faithful adherence to the initial denial, irrespective of whether that denial was correct or incorrect.

The court's tortured interpretation of the duplicate claims regulation comes about as a result of this one claimant's refusal either to appeal or to seek modification of an arguably erroneous decision and the court's unwillingness to accept the result that he may, as a consequence of his insouciance, find himself without remedy. As a court of law, however, we should recognize that this circumstance is an extraordinarily unusual one, not likely to frequently, if ever, repeat itself, and resist the temptation to yield to our collective sense as to what would be "fair" in this most peculiar of circumstances. Doing so, and simply applying the plain language of the regulation, I would vacate and remand to the ALJ for reconsideration of whether Rutter, under the standard adopted by the Seventh Circuit in *Sahara*, has shown a "material change in conditions."

Chief Judge Wilkinson and Judges Russell, Wilkins, Hamilton and Williams join in this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-2523

LISA LEE MINES (TERRILYNNE COAL COMPANY),
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; ALVA RUTTER,
Respondents.

On Petition for Review of an Order
of the Benefits Review Board,
(92-338-BLA)

Argued: May 4, 1995

Decided: June 16, 1995

Before: RUSSELL, HAMILTON, and LUTTIG,
Circuit Judges.

Vacated and remanded by published opinion. Judge Luttig wrote the opinion, in which Judge Russell and Judge Hamilton joined.

OPINION

LUTTIG, Circuit Judge:

Having previously been denied black lung benefits, Virginia miner Alva Rutter filed a "duplicate claim" for bene-

fits under 20 C.F.R. § 725.309. The ALJ awarded benefits. The Benefits Review Board held that the ALJ's reasoning was flawed, but nonetheless affirmed the award on other grounds. Rutter's employer, petitioner Lisa Lee Mines (Lisa Lee), seeks review of the Board's decision. Because we conclude that the Board exceeded its mandate and employed an improper standard in reviewing Rutter's claim, we vacate and remand.[1]

I.

Alva Rutter filed his first application for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*, in 1986. A Department of Labor deputy commissioner denied that claim, finding that although Rutter had presented evidence of complicated pneumoconiosis, he had not established that the disease was caused by coal mine work, or that he was totally disabled by the disease. The notice of denial of benefits informed Rutter of the procedures for appealing the decision, but Rutter did not take any action to contest the denial within 60 days, nor did he seek reconsideration of the decision within one year. The denial of benefits therefore became final.

Rutter continued to work in the mines, and in 1989 filed a second application for black lung benefits. The regulation applicable to such "duplicate claims" provides that.

> [i]f the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions . . . .

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[1] Because we vacate the Board's decision on these grounds, we do not address Lisa Lee's alternative argument that 20 C.F.R. §725.309, the regulation which permits claimants such as Alva Rutter to file "duplicate claims," is inconsistent with 30 U.S.C. § 922 and therefore invalid. *See* Petitioner's Br. at 12-16.

20 C.F.R. § 725.309(d).[2] Rutter's duplicate claim was initially reviewed by a Department of Labor deputy commissioner, who determined that Rutter was eligible for benefits from Lisa Lee. Dissatisfied with the Deputy Commissioner's ruling, which failed to explain how Rutter's evidence demonstrated a material change in conditions since 1986, Lisa Lee requested that the matter be referred to an ALJ for a determination of whether a material change in conditions had in fact occurred.

On referral, the ALJ failed to make the explicit finding of material change in conditions seemingly required by section 725.309(d). He found only that "the newer evidence appears to support the deputy commissioner's award, . . . establish[ing] a deterioration of the disease." J.A. at 14. The ALJ concluded that Rutter was entitled to benefits because the 1986 denial of benefits had been improper.

> Based on the x-ray evidence at the time, there is no question that the deputy commissioner erred in denying the claim in 1986.
>
> . . .
>
> *Assuming that the evidence is inadequate to establish a material change of condition,* it is concluded that the Claimant is still entitled to an award of benefits.
>
> . . .
>
> The deputy commissioner's prior denial [of Rutter's 1986 claim] is based on an error clearly evident on the face of the record . . . . Under the circumstances of this record . . . the deputy commissioner's [1986] denial is null and void *ab initio.*
>
> . . .

---

[2] Section 725.309(d) also states that the duplicate claim will not be denied if "the later claim is a request for modification and the requirements of § 725.310 are met." Rutter's claim, however, did not seek modification of the earlier denial of benefits.

> Accordingly . . . *it is believed that a determination whether or not the new evidence establishes a change of condition is immaterial.*

J.A. at 14-16 (emphasis added).

On appeal, the Benefits Review Board affirmed the award of benefits, but only after expressly rejecting the ALJ's reasoning. The Board held that "the administrative law judge was without jurisdiction to consider [the 1986] decision," and that "the administrative law judge erred as [a] matter of law in concluding that claimant would be entitled to an award of benefits even if he could not establish a change in conditions." J.A. at 4. Rather than remand to the ALJ for a determination of whether Rutter had shown a material change in conditions, however, the Board undertook that analysis itself, and concluded that the ALJ's findings were sufficient to support a finding of material change in conditions under the Board's decision in *Spese* v. *Peabody Coal Co.*, 11 B.L.R. 1-174 (1988). Under *Spese*, a claimant may show material change in conditions merely by "present[ing] evidence which is 'relevant and probative so that there is a reasonable possibility that [it] would change the prior administrative result.' " J.A. at 6 (quoting *Spese*, 11 B.L.R. at 1-176). In the Board's view, Rutter had satisfied the *Spese* standard by introducing new evidence—in the form of two x-ray analyses, a pulmonary function study, a blood gas study, and a physical examination—that suggested he was entitled to benefits.

II.

The ALJ plainly lacked authority under 20 C.F.R. § 725.309(d) to revisit the 1986 ruling,[3] and the ALJ's

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[3] The regulation authorizing the reconsideration of prior decisions is 20 C.F.R. § 725.310, which provides that "[u]pon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may . . . *at any time before one year after the denial of a claim*, reconsider . . . [a] denial of benefits." (Emphasis added.) As noted earlier, *see supra* n.2,

conclusion that "a determination of whether or not the new evidence establishes a change of condition is immaterial" to an evaluation of a duplicate claim was in direct contravention of section 725.309(d). The Board therefore properly rejected the reasoning underlying the ALJ's award of benefits. The Board itself erred, however, by proceeding to evaluate whether Rutter's evidence established the necessary material change in conditions, rather than remanding to allow the ALJ to undertake this determination. *See DOWCP* v. *Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) ("We hold that the Board failed to adhere to its limited statutory function. . . . When the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case to the ALJ . . . rather than attempting to fill the gaps in the ALJ's opinion."); *Sahara Coal Co.* v. *OWCP*, 946 F.2d 554, 557 (7th Cir. 1991) ("A material change in condition . . . is a factual question for the administrative law judge, not the Benefits Review Board, to resolve.").

The Board further erred in evaluating Rutter's duplicate claim under the standard set forth in *Spese*. The *Spese* standard allows the "material change in conditions" requirement of 20 C.F.R. § 725.309(d) to be satisfied merely by "evidence which is 'relevant and probative so that there is a reasonable possibility that [it] would change the prior administrative result.' " The standard impermissibly allows a clainant to present—in addition to evidence tending to show that his condition has materially changed since the earlier denial of benefits, as contemplated by section 725.309(d)—evidence available at the time of the initial decision tending to show that the initial decision was in error. *See, e.g., Sahara*, 946 F.2d at 556 (*Spese* "is a plain misreading of the regulation and makes mincemeat of res judicata; . . . it seems the Board ha[s]

Rutter could not avail himself of this regulation because by 1989 more than a year had passed since the denial of his initial application for benefits.

confused a change in the claimant's condition with the presentation of newly discovered evidence that might justify reopening the case . . . ."); *Sharondale Corp.* v. *Ross*, 42 F.3d 993, 996-99 (6th Cir. 1994). The purpose of section 725.309(d) is not to allow a claimant to revisit an earlier denial of benefits, but rather only to show that his condition has materially changed since the earlier denial. Section 725.310 is the only provision that allows a claimant to challenge a denial of benefits. *See supra* n.3. On remand, therefore, the ALJ should not rely upon *Spese* in evaluating whether claimant has shown a material change in condition such as to warrant the award of benefits.

While the parties before us agree that *Spese* is an impermissible reading of section 725.309(d), they are not in accord as to which standard should replace *Spese*. Lisa Lee urges adoption of the rule articulated by the Seventh Circuit in *Sahara*:

> A material change in conditions means either that the miner did not have black lung disease at the time of the first applicaiton but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application. . . . If the evidence shows not that his condition has worsened since the first application but merely that he should not have been turned down, he has failed to demonstrate a material change in his condition; he is merely attempting to relitigate his original claim.

Sahara, 946 F.2d at 556. The Director argues that *Sahara* imposes too great a burden upon the miner to establish a change in condition, and would have us instead adopt a standard which "requires simply that the miner prove at least one of the elements of entitlement previously decided against him." Respondent's Br. at 31. Specifically, under the Director's proposed standard, the ALJ would

> consider the new evidence, submitted by all parties in connection with the duplicate claim, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. The element in question must be one capable of change (for example, the existence of pneumoconiosis, total disability, etc.). If this element is established, then a material change has been demonstrated as a matter of law. The judge must then consider whether all of the evidence in the record, including the evidence predating the denial of the prior claim, supports a finding of entitlement to benefits.

Respondent's Br. at 22 (footnotes omitted).

Faced with the same choice of rules, the Sixth Circuit opted for the Director's proposed standard, on the grounds that the Director's view is entitled to the deference we conventionally accord agency interpretations. *Sharondale*, 42 F.3d at 998 (citing *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984)). In our view, the Director's proposed standard is not entitled to deference because it is not a reasonable interpretation of section 725.309(d). Like the invalid *Spese* standard, the "one element" standard proposed by the Director allows the claimant to bootstrap into reconsideration of the original decision denying benefits. As the Director frankly acknowledges, once the "material change" threshold is crossed by proving one of the elements previously adjudicated against the claimant, then all errors committed in the initial proceeding become reviewable. *See* Respondent's Br. at 29. Effectively, therefore, the original decision denying benefits is reopened without a showing of actual material change. Judge Posner's observation as to the *Spese* standard is equally apropos of the "one element" standard: it "makes mincemeat" of the doctrine of *res judicata* underlying section 725.309(d).

Respondent Rutter's case is paradigmatic of the regulatory circumvention that would result from adoption of the Director's standard. Rutter's 1986 application for benefits was denied because the deputy director concluded that Rutter had failed on two grounds to establish a valid claim. Notwithstanding that this decision became final by virtue of Rutter's failure to appeal timely, Rutter would, under the Director's standard, be permitted effectively to challenge both grounds of this decision merely by proving a material change in the conditions that prompted the decision on one of the grounds. Reconsideration of the decisional ground as to which the underlying circumstances remain unchanged, however, is precisely what is prohibited by section 725.309(d). Indeed, given that the Director's "one element" standard suffers from the same fundamental flaw as does the *Spese* standard, namely, that it permits reconsideration of critical determinations underlying a decision denying benefits where no material change in the conditions prompting those determinations is actually shown, we are at a loss to understand how the Director can urge this standard and at the same time concede the invalidity of the *Spese* standard.

We reject the "one element" standard, in favor of the standard adopted by the Seventh Circuit in *Sahara*, a standard which, unlike that proposed by the Director, is faithful both to the language and purposes of section 725.309(d). The decision of the Board is vacated and the case is remanded to the ALJ for reconsideration of Rutter's claim under the standard adopted herein.

VACATED AND REMANDED

APPENDIX C

[Date Issued: Sep. 30, 1994]

U.S. DEPARTMENT OF LABOR
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 92-0338 BLA
OWCP No. 225-50-7128

ALVA RUTTER,
Claimant-Respondent

v.

LISA LEE MINES (TERRILYNNE COAL COMPANY),
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest

Appeal of the Decision and Order of
Aaron Silverman, Administrative Law Judge,
United States Department of Labor

DECISION and ORDER

PER CURIAM:

Employer appeals the Decision and Order (90-BLA-0857) of Administrative Law Judge Aaron Silverman awarding benefits on a claim filed pursuant to the pro-

visions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found that the instant claim constituted a duplicate claim pursuant to 20 C.F.R. § 725.309, Decision and Order at 4, and that claimant established a coal mine employment history of thirty-two years. Decision and Order at 4-5. The administrative law judge, while not specifically determining that a material change in conditions had been established, noted that uncontradicted evidence of record established complicated pneumoconiosis Decision and Order at 4, that the complicated pneumoconiosis arose out of coal mine employment, Decision and Order at 4-5 and that newly submitted medical evidence "shows a definite progression of the disease occurring over another interval of time resulting in the Claimant's reduced capacity to do his former regular coal mine work." Decision and Order at 5. Accordingly, benefits were awarded commencing August 1, 1986. The administrative law judge further noted that, even if "the evidence is inadequate to establish a material change of condition, it is concluded that the Claimant is still entitled to an award of benefits." Decision and Order at 5. In so doing, the administrative law judge determined that the denial of the initial claim by the district director [1] was "null and void *ab initio*." Decision and Order at 5. The administrative law judge therefore concluded that since "there is no decision in effect to which the doctrine of res judicata can apply," Decision and Order at 6, "it is believed that a determination whether or not the new evidence establishes a change in condition is immaterial." Decision and Order at 6. On appeal, employer contends that the material change in conditions standard, established by the Board in *Spese v. Peabody Coal Co.*, 11 BLR 1-174, 1-176 (1988), is erroneous and that the administrative

[1] Formerly "Deputy Commissioner," *see* 20 C.F.R. 725.101(a)(11); 55 *Fed. Reg.* 28606 (July 12, 1990).

law judge erred in finding a material change in conditions established pursuant to Section 725.309. Employer further contends that the administrative law judge erred in concluding that claimant did not have to establish a material change in conditions as a prerequisite for an award of benefits in this case and that the administrative law judge exceeded his jurisdiction in invalidating the initial finding of the districe director. Claimant, in response, urges that the Decision and Order of the administrative law judge be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, files a response brief and urges that the Decision and Order of the administrative law judge be affirmed. The Director contends while the administrative law judge improperly invalidated the initial determination of the district director, the administrative law judge did properly determine that a material change in conditions was established, and therefore properly awarded benefits on this finding. The Director also urges that the onset date be modified from August 1, 1986, to April 1, 1989.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The procedural history of this claim is as follows. On July 1, 1986, claimant filed his initial claim for benefits, Director's Exhibit 41, a claim denied by the district

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[2] Inasmuch as the administrative law judge's length of coal mine employment finding, his finding that the evidence of record established complicated pneumoconiosis and his finding that complicated pneumoconiosis arose out of coal mine employment are unchallenged on appeal, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

director who concluded that claimant failed to establish a totally disabling respiratory impairment or that his pneumoconiosis arose out of coal mine employment, Director's Exhibit 41, Claimant took no further action with regard to this denial. On April 25, 1989, claimant filed the instant claim. Director's Exhibit 1. The district director concluded that claimant established a material change in conditions and awarded benefits on this claim on November 1, 1989, Director's Exhibits 32, 33. Employer thereafter sought a hearing before the Office of Administrative Law Judges on the issue of whether claimant established a material change in conditions. Director's Exhibits 36, 43. Subsequent to the setting of the hearing date, both parties agreed, claimant by letter dated February 20, 1991 and employer, by letter dated February 11, 1991, to dispense with the oral hearing and have the administrative law judge decide the case on the record. On October 11, 1991, the administrative law judge issued the Decision and Order awarding benefits from which employer now appeals.

Initially, we address the propriety of the administrative law judge's conclusion that the district director's initial denial was, in effect, not valid. Employer contends that the administrative law judge exceeded his jurisdiction in determining that the district director's 1986 decision was "null and void *ab initio*." Decision and Order at 5. We agree. As discussed previously, *see* procedural history, *supra*, the district director on September 16, 1986, issued a Proposed Decision and Order denying benefits. Director's Exhibit 41. Claimant took no action with regard to this denial. In concluding that this decision of the district director was "null and void *ab initio*," Decision and Order at 5, the administrative law judge noted that the district director's:

> prior denial in this case is based on an error clearly evident on the face of the record owing to the un-

> opposed x-ray readings of complicated pneumoconiosis which trigger the irrebuttable presumption of total disability. The presumption is a rule of law. It cannot be overcome by any evidence and the [district director's] act in denying the claim in 1986 with the Claimant's unchallenged history of coal mine employment was beyond the scope of his authority and is neither final nor binding. He cannot by a mistake deny the Claimant the benefits to which he was by law entitled. Under the circumstances of this record, the Claimant was and is conclusively presumed to be totally disabled due to pneumoconiosis and entitled to benefits as he was in 1986 . . .

Decision and Order at 5. Contrary to the finding of the administrative law judge, and as contended by both employer and the Director, once the proposed Decision and Order is issued by the district director, the burden is on the party challenging the decision to respond in a timely fashion to the decision, in this case by submitting new evidence or requesting a hearing within sixty days or take action within the one-year modification period prescribed at 20 C.F.R. § 725.310. Director's Exhibit 41. Failure to take such action renders the proposed Decision and Order final. In the case at bar, claimant failed to take any such action and therefore the decision of the district director became final. As the Director notes, once the district director's September 16, 1986, decision became final, specifically on September 16, 1987, at the end of the one-year modification period, the administrative law judge was without jurisdiction to consider that decision. 20 C.F.R. § 725.450. Claimant's only recourse after the initial decision became final was to file a new claim, 20 C.F.R. § 725.409(b), a "duplicate" claim which must be denied on the grounds of the prior denial unless claimant could establish a material change in conditions. 20 C.F.R. § 725.309; *see generally Lukman v. Director,*

OWCP, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); *Dotson v. Director, OWCP*, 14 BLR 1-10 (1990). In the instant case, claimant filed a duplicate claim, and accordingly, the extent of the administrative law judge's jurisdiction was to determine whether claimant established a material change in conditions, and, if so, whether claimant had established entitlement. *See Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). Accordingly, we vacate the administrative law judge's invalidation of the September 16, 1986 decision by the district director, and hold that the administrative law judge erred as matter of law in concluding that claimant would be entitled to an award of benefits even if he could not establish a change in conditions.

Nevertheless, for the reasons that follow, we affirm the administrative law judge's award of benefits. Employer, on appeal, contends that the material change in conditions standard enunciated by the Board in *Spese, supra* is "legally incorrect and . . . must be overruled," Employer's Brief at 5, and thus the administrative law judge's reliance on this standard "is not supported by substantial evidence and is not in accordance with law", Employer's Brief at 8. Employer urges that the standard established by the United States Court of Appeals for the Seventh Circuit in *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991) is the proper standard and should be applied to the case at bar. Employer further states that "[u]nder the circumstances of this case, a material change in condition could not be established." Decision and Order at 8. While the administrative law judge did not render an explicit finding that claimant established a material change in conditions pursuant to 20 C.F.R. § 725.309, he did note:

> Without explaining how, or why, the [district director] determined that the [newly submitted] x-ray analysis by Drs. Sutherland and Schrader [Director's

> Exhibits 17, 21] and Dr. Sutherland's pulmonary function and blood gas studies and physical examination [Director's Exhibits 16, 18, 19] established a material change in conditions in 1989 leaving his decision open to speculation and subject to attack herein by the Employer. Nevertheless, the newer evidence appears to support the deputy commissioner's award. In general it establishes a deterioration in the Claimant's disease.

Decision and Order at 4. The Board has held that in order to establish a material change in conditions pursuant to 20 C.F.R. § 725.309 claimant must present evidence which is "relevant and probative so that there is a reasonable possibility that [it] would change the prior administrative result," *see Spese*, at 11 BLR 1-176 (1988); *see also Shupink, supra*; *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990) (*en banc*). We have previously rejected similar contentions that we apply the standard enunciated in *McNew, supra. See Shupink* 17 BLR at 1-28. Inasmuch as employer has failed to present any compelling reason why the Board should overturn the precedent established in *Spese, supra*, we reject employer's contention and hold that the administrative law judge's finding is sufficient to support a finding of a material change in conditions pursuant to Section 725.309. Inasmuch as the merits of entitlement have not been challenged by employer, *see* n. 2, *supra*, we therefore affirm the administrative law judge's finding of entitlement.

The Director further urges that the onset date be modified from August 1, 1986, to April 1, 1989. In determining the onset date, the administrative law judge merely stated that claimant was entitled to benefits "beginning August 1, 1986, consistent with and in the manner required by the applicable statutory and regulatory provisions." Decision and Order at 6.

As a general rule, once claimant's entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which

claimant became totally disabled. 20 C.F.R. § 725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Curse v. Director, OWCP*, 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988); *Lykins v. Director, OWCP* 12 BLR 1-181 (1989). It is well established that if the date of onset is not ascertainable from all the relevant evidence of record, then benefits will commence with the month during which the claim was filed. 20 C.F.R. § 725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corporation*, 14 BLR 1-47 (1990); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1984); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In the instant claim, Dr. Sutherland opined that claimant was totally disabled based on an examination and x-ray establishing complicated pneumoconiosis dated June 16, 1989. Director's Exhibits 18, 21. Dr. Sutherland's report does not indicate when claimant's total disability began, it only indicates that claimant became totally disabled at some time prior to the examination. *See Owens, supra*; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985); *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985); *Tobrey v. Director, OWCP*, 7 BLR 1-407 (1984); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). Accordingly, we modify the administrative law judge's date of onset from August 1, 1986, to April 1, 1989, the first day of the month in which claimant filed the instant claim.

Accordingly, the Decision and Order of the administrative law judge is modified, in part, and the award of benefits is affirmed.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER,
Acting Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

APPENDIX D

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE ISSUED: October 11, 1991

CASE No.: 90-BLA-857

OWCP No.: 225-50-7128

In the Matter of
ALVA RUTTER,
Claimant,
v.

LISA LEE & TERRILYNNE MINES,
Employer,
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest

DECISION AND ORDER—AWARD OF BENEFITS

Proceeding under the Black Lung Benefits Reform Act of 1977 (Act)[1] for total disability due to pneumoconiosis.[2]

ISSUE

Whether the claim is barred on the ground of res judicata.

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[1] Pub. L. 95-239, Title IV, Federal Coal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 901 *et seq.*

[2] "Black lung", a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. 30 U.S.C. § 902(b).

STATEMENT OF THE CASE

The Claimant filed for black lung benefits on July 1, 1986. It was denied by the deputy commissioner September 16, 1986, for the reasons that the evidence did not show that pneumoconiosis was caused at least in part by coal mine work, and did not show that the Claimant was totally disabled by pneumoconiosis.

The Claimant refiled in April 1989, Benefits were awarded retroactive to August 1, 1986, on the finding by the deputy commissioner of a material change of condition establishing total disability due to pneumoconiosis arising out of coal mine employment.

The Employer contends that the latest medical evidence relied on by the deputy commissioner merely confirms that the Claimant has complicated pneumoconiosis by which he was irrebuttably presumed to be totally disabled as established by the evidence in 1986, and since the Claimant cannot be more than totally disabled there is no material change in condition and the prior denial which the Claimant failed to appeal is res judicata.

MEDICAL EVIDENCE IN 1986

X-rays

Date	Reading Date	Physician/Rating [3]	Interpretation
8/6/86	8/24/86	D. Gaziano/B	2/2 q, t. "A" opacities
8/6/86	9/12/86	K. McCluney/B-C/B	2/3 q, q. "A" opacities

Spirometry

Date	Age/Hgt	FVC	FEV_1	MVV	Comp./Coop.
8/6/86	50/68"	485	3.69	105	good/good

Blood Gases

Date	PCO_2	PO_2
8/6/86	44.4	77.9
	41.2	78.3 (exercise)

[3] The abbreviation B-C means Board-certified radiologist. The abbreviation "B" means the physician is qualified as a B-reader. Reader ratings are assigned by the National Institute of Occupa-

MEDICAL EVIDENCE IN 1989

X-Rays

Date	Reading Date	Physician/Rating	Interpretation
8/18/88	8/18/88	G. Schrader	
	*1. Diffuse conglomerate interstitial fibrosis compatible with far advanced pneumoconiosis.		
	2. Mild to moderate degree of chronic pulmonary emphysema.		
6/16/89	6/18/89	J.P. Sutherland/A	2/3 p,p. "A" opacities
6/16/89	6/28/89	E.N. Sargent/B	3/2 q,q. "B" opacities

Spirometry

Date	Age/Hgt	FVC	FEV_1	MVV	Comp/Coop.
6/16/89	53/64	426	2.90	94	good/good

Comment: FVC normal limits
Mild expiratory obstruction
MVV mildly reduced.

Blood Gases

Date	PCO_2	PO_2
6/16/89	38.3	74

MEDICAL REPORT

The clinical data above were obtained in the course of the Claimant's physical evaluation by Dr. C.P. Vasudevan on August 6, 1986. He reported that the Claimant's pulmonary function study was essentially normal and that the Claimant did not reach any exercise, cardiac or pulmonary threshold limitations or ventilatory limitation at the peak of the exercise. In another part of the report, he stated that based on the x-ray, the Claimant may have a ventilatory impairment to exercise, but the exercise level was suboptimal and he couldn't draw any conclusion as to the Claimant's exercise capacity. He diagnosed coal

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tional Safety and Health, U.S. Public Health Service, 42 CFR § 37.51. A "B" rating denotes a reader of superior experience and proficiency over an "A" rating, and the reader of a B-reader may be given additional weight by the adjudicating officer. See *Sharpless v. Califano*, 585 F.2d 664, 666 (4th Cir. 1978).

workers' pneumoconiosis which he opined was related to exposure to coal mine dust.

MEDICAL REPORT

The above clinical data were obtained in connection with the Claimant's physical evaluation by Dr. J.P. Sutherland on June 16, 1989, who diagnosed complicated pneumoconiosis.

FINDINGS AND CONCLUSIONS

I.

Section 921 (c)(3) of the Act as implemented by § 718.304 [4] of the regulations provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis when diagnosed by x-ray to have large opacities that are classified as A,B, or C, commonly known as complicated pneumoconiosis.

Based on the x-ray evidence at the time, there is no question that the deputy commissioner erred in denying the claim in 1986.

Section 725.309(d) of the regulations provides that if an earlier claim has been finally denied, a later claim shall also be denied on the grounds of the prior denial unless the deputy commissioner determines that there has been a material change in conditions. Without explaining how, or why, the deputy commissioner determined that the x-ray analysis by Drs. Sutherland and Schrader and Dr. Sutherland's pulmonary function and blood gas studies and physical examination established a material change in conditions in 1989, leaving his decision open to speculation and subject to the attack herein by the Employer. Nevertheless, the newer evidence appears to support the deputy commissioner's award. In general, it establishes a deterioration in the Claimant's disease.

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[4] 20 CFR Part 718.

In 1986, the x-ray showed small opacities of 2/2 profusion in four lung zones with category A large opacities. In 1989, the x-ray showed small opacities of greater profusion in all six lung zones plus category B large opacities which are either larger or more numerous than those in category A.

Although still not meeting the regulatory criteria necessary to establish a totally disabling pulmonary insufficiency, the 1989 pulmonary function and blood gas values show increased respiratory and gas exchange morbidity.

In contrast to their absence in earlier findings, on examination in 1989, the Claimant was found to complain of coughing, wheezing, dyspnea, and occasional chest pain. As detected by Dr. Sutherland, there was some ankle edema and rales and rhonchi from a barrel-shaped chest.

The Claimant's history of coal mine employment showed many years of work as a cutting machine operator, and hand loader before 1986. By 1989, he was working as a beltman, explaining that he had been changed to that from a mine helper because of his breathing problems and could no longer do the heavy work of a mine helper. The record establishes an undisputed coal mine history of 32 years entitling him to the finding that his pneumoconiosis arose out of coal mine employment.

Accordingly, it is concluded that the medical evidence in 1989 shows a definite progression of the disease occurring over another interval of time resulting in the Claimant's reduced capacity to do his former regular coal mine work.

II.

Assuming that the evidence is inadequate to establish a material change of condition, it is concluded that the Claimant is still entitled to an award of benefits.

In the first instance, the Benefits Review Board has held that the Act contains a legislative mandate that res

judicata and collateral estoppel are not applicable to claims filed under the Act, noting that the Reform Act added a provision for review of all pending or denied claims. *Trujillo v. Kaiser Steel Corporation*, 3 BLR 1-497 (1981). Further, the doctrine is a judicially created rule of fairness, not to be applied to work an injustice and Courts have held that the invocation of the doctrine is an abuse of discretion when a prior decision is based on an error manifest on the face of the record. *Harrah v. Richardson*, 446 F.2d 1 (4th Cir. 1971). *Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969).

The deputy commissioner's prior denial in this case is based on an error clearly evident on the face of the record owing to the unopposed x-ray readings of complicated pneumoconiosis which trigger the irrebuttable presumption of total disability. The presumption is a substantive rule of law. It cannot be overcome by any evidence and the deputy commissioner's act in denying the claim in 1986 with the Claimant's unchallenged history of coal mine employment was beyond the scope of his authority and is neither final nor binding. He cannot by a mistake deny the Claimant the benefits to which he was by law entitled. Under the circumstances of this record, the Claimant was and is conclusively presumed to be totally disabled due to pneumoconiosis and entitled to benefits as he was in 1986, and deputy commissioner's denial is null and void *ab initio*. Therefore, there is no decision in effect to which the doctrine of res judicata can apply.[6]

Accordingly, for the above reasons, it is believed that a determination whether or not the new evidence establishes a change of condition is immaterial.

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[6] See cases: West's Federal Practice Digest, 4th Ed., Vol. 1, Admin. Law, Section 305.

ORDER

Upon consideration of the record as a whole, it is found that the Claimant is totally disabled due to pneumoconiosis arising out of coal mine employment and Lisa Lee & Terrilynne Mines as the responsible operator are, hereby, held to be liable for:

1. Payment of black lung disability benefits to Alva Rutter beginning August 1, 1986, consistent with and in the manner required by the applicable statutory and regulatory provisions.

2. Repayment to the Trust Fund all moneys heretofore paid from it to the Claimant for total disability due to pneumoconiosis.

/s/ Aaron Silverman
AARON SILVERMAN
Administrative Law Judge

Washington, DC
AS/ls

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a Notice of Appeal with the Benefits Review Board, 5th floor, 800 "K" Street, NW, Washington, D.C. 20001-8002.

APPENDIX E

[SEAL]

U.S. DEPARTMENT OF LABOR

Employment Standards Administration
Office of Workers Compensation Programs
Division of Coal Mine Workers' Compensation
319 Washington Street
Johnstown, PA 15901
(814) 533-4348

PROPOSED DECISION AND ORDER OF MATERIAL CHANGE IN CONDITION AND AWARD OF CLAIM

Claim Number: JO 225-50-7128

IN THE MATTER OF THE CLAIM FOR BENEFITS UNDER THE BLACK LUNG BENEFITS ACT

ALVA RUTTER,
Claimant

v.

LISA LEE MINES,
Employer/Carrier

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Pursuant to 20 CFR 725.309(c), (d), 725.418, and having reviewed the new claim and the documentary and other evidence of record relevant to it, the Deputy Commissioner issues this proposed decision and order of material change in condition and award of benefits.

FINDINGS OF FACT

1. The claimant, Alva Rutter, filed a new claim under the Black Lung Benefits Act, 30 USC 901 *et seq.*, on 4-25-89.

2. The claimant's previous benefit application was filed on 7-1-86 and was finally denied on 9-16-86.

3. Since the new claim was filed more than one year after the denial of the previous claim, the later claim is not a request for modification and the requirements of 20 CFR 725.310 are not met.

4. The claimant has established a material change in condition because he has established the required elements of entitlement pursuant to the entitlement criteria in effect at the time the claim was filed, 20 CFR Part 718.

5. The Deputy Commissioner bases this finding of material change in condition on the following evidence of record which he/she finds credible and, therefore, determinative of the claimant's total disability or death due to pneumoconiosis arising out of coal mine employment:

Type of Evidence	Doctor	Date
X-Ray	Dr. Sutherland	6-16-89
X-Ray	Dr. Schrader	8-18-88
Pulmonary Function Studies	Dr. Sutherland	6-16-89
Arterial Blood Gas	Dr. Sutherland	6-16-89
Physical	Dr. Sutherland	6-16-89

6. Thus, there is established a material change in conditions and this duplicate claim must be awarded.

7. Review of the medical evidence of record establishes that the claimant is totally disabled due to pneumoconiosis arising out of coal mine employment or that the claimant's death was due to pneumoconiosis arising out of coal mine employment.

ORDER

In accordance with 20 CFR 725.309(c), (d), 725.418, the Deputy Commissioner finds that the claimant has established a material change in his condition, that the claimant has established his total disability of death due to pneumoconiosis arising out of coal mine employment and that this claim must, therefore, be awarded.

Signed at Johnstown, Pennsylvania

This 13th day of Nov., 1989

/s/ Margaret R. Peterson
MARGARET R. PETERSON
Deputy Commissioner

NOTICE OF APPEAL RIGHTS. Pursuant to *Lukman* v. *Director, OWCP*, 10 BLR 1-56 (1987), *affirmed on reconsideration*, 11 BLR 1-71 (1988) (*en banc*), any party dissatisfied with this proposed decision and order may appeal it to the Benefits Review Board within thirty (30) days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board, 111 20th Street, NW, Suite 757, Washington, DC 20036

APPENDIX F

Ltr. CM1100a
Rev. Jan. 1982

PO Box 3696
Charleston, WV 25335
Sep. 16, 1986

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION

Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation

ALVA RUTTER
PO Box 840
Raven, VA 24639

RE: CH 225-50-7128

Dear Claimant:

We have carefully reviewed the evidence in your claim under the Black Lung Benefits Act. This evidence does not show that you qualify for black lung benefits. Your claim is therefore denied.

To qualify for black lung benefits, you must show that:

1. You have pneumoconiosis (black lung disease); *and*
2. the disease was caused at least in part by your coal mine work; *and*
3. the disease has caused total disability.

You must meet *all three* of the above conditions to qualify for black lung benefits.

You do not qualify for benefits because the evidence in your claim

1. ( ) does not show that you have pneumoconiosis (black lung disease);

2. (X) does not show that the disease was caused at least in part by coal mine work;

3. (X) does not show that you are totally disabled by the disease. Totally disabled means you are unable to perform the type of work required by your coal mine work because of a breathing impairment caused by pneumoconiosis (black lung disease). The results of your medical evidence are shown on the enclosed explanation.

If you disagree with this determination you may pursue your claim further if you:

(1) SUBMIT ADDITIONAL EVIDENCE

You may refer to the enclosed "Guide for Submitting Additional Evidence" (CM-1000g) on which we have checked the items that will be helpful in pursuing your claim. You must send the evidence to us within 60 days of the date of this letter. If you need more time, you must request approval from this office.

OR

(2) REQUEST A HEARING ON YOUR CLAIM

Your claim can be scheduled for a formal hearing conducted by the Office of Administrative Law Judges of the United States Department of Labor. An informal conference may be scheduled prior to the hearing if it appears a conference would be helpful in resolving your claim. If you want a hearing, you must make your request within 6 days of the date of this letter unless you notify us that you intend to submit additional evidence.

If you intend to pursue your claim, you may wish to obtain a representative in order to be sure that your rights are fully protected. We will furnish copies of all

the evidence in your claim to any representative you choose. If you obtain a representative, you must complete the enclosed authorization (CM-1078) and return it to this office.

If you do not take any action within 60 days, your claim will be considered abandoned.

Sincerely,

Beverly Pauley
Claims Examiner (304) 347-5381

BP/jg
Enclosure(s): CM-1000g; CM-1078; CM-998

NOTE: You have the right to ask for reconsideration of your claim if you write to this office within one year from the date of this letter, but *only* if your condition has changed, or a mistake was made when your claim was denied. If you request reconsideration, you *must* submit proof to support your request.

APPENDIX G

[Filed November 16, 1995]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-2523
CA-92-338-BLA

LISA LEE MINES (TERRILYNNE COAL COMPANY),
Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; ALVA RUTTER,
Respondents

On Petition for Rearing with Suggestion for Rehearing in Banc

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The respondent, Alva Rutter's, petition for rehearing and suggestion for rehearing in banc were submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing in banc,

IT IS ORDERED that the rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the 1/29/96-2/2/96 session of Court. Within ten days of the date of this order,

twenty (20) additional copies of appellant's brief, twenty (20) additional copies of appellee's brief and twenty (20) additional copies of the appellant's reply brief, if any shall be filed. Respondent, Alva Rutter, will file twenty (20) additional copies of the joint appendix.

FOR THE COURT

/s/ Bert M. Montague
Clerk